United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4275

In The

United States Court of Appeals

For the Second Circuit

COMMUNICATION WORKERS OF AMERICA, LOCAL 1122,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NEW YORK TELEPHONE COMPANY,

Intervenor.

Petition for Review of a Decision and Order of the National Labor Relations Board

BRIEF FOR PETITIONER

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STATUTES INVOLVED

National Labor Relations Act (29 U.S.C. § 151 et seq.)

§ 158. Unfair labor practices

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

QUESTIONS PRESENTED

1. Whether employees represented by CWA Local 1122 ever adjusted grievances within the meaning of § 8(b)(1)(B) while acting as temporary supervisors?

2. Whether the employer's voluntary abstention from using temporary supervisors for three years following the ban was a waiver of § 8(b)(3) rights?

3. Whether supervisor-members are "employees" within the meaning of § 8(b)(1)(A)?

4. Whether a refusal to bargain is "restraint or coercion" within the meaning of § 8(b)(1)(A)?

5. Is a union fine prohibiting only its members from accepting temporary supervisor appointments an unfair labor practice under § 8(b)(1)(A) when the primary objective of the rule is to preserve union loyalty and to increase promotions to permanent supervisory positions; the union enforces the fine solely through intra-union techniques by permitting the employee to leave the union, accept the temporary appointment and later return to his bargaining unit position; and when no statutory labor policy prohibits the primary objective of the rule?

NATURE OF THE CASE

This is a petition for review of a decision and order of the National Labor Relations Board (226 NLRB No. 7)(1976). The Board found that on the facts presented the petitioner, Local 1122 of the Communication Workers of America, AFL-CIO, had committed unfair labor practices under § 8(b)(1)(A), (B) and § 8(b)(3). Local 1122 contends that the Board's determination is unsupported by substantial evidence viewing the entire record, and that its interpretation of various provisions of the Act vary significantly from statutory policy and Supreme Court precedent.

PROCEEDINGS AND DISPOSITION BELOW

The employer, New York Telephone Company, filed these unfair labor practice charges on July 24, 1975. The regional office issued its complaint and notice of hearing on July 25, 1975. Local 1122 filed its answer on October 7, 1975.

A hearing on the charges was held in Buffalo, New York on January 19-20, 1976 before Elbert D. Gadsden, Administrative Law Judge. On May 18, 1976 the Administrative Law Judge issued his decision finding that Local 1122 had committed

no unfair labor practices. The complaint was dismissed.

Both General Counsel and the employer filed exceptions to the decision of the Administrative Law Judge which were answered by Local 1122. Thereafter, on September 23, 1976 a panel of the Board issued its decision and order reversing the determination of the Administrative Law Judge. (NLRB Case No. 3-CB-2565; 226 NLRB No. 7) (1976).

Local 1122 petitioned for review of the Board's order. The employer's motion to intervene in the appeal was granted and the Board filed a cross-application for enforcement of its order.

STATEMENT OF FACTS *

Local 1122 is a constituent member of the Communication Workers of America, AFL-CIO, with territorial

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* (E.) refers to pages in the Exhibit Volume.
(A.) refers to pages in the Joint Appendix.
(Tr.) refers to pages in the Transcript of the hearing before the Administrative Law Judge not included in either the Exhibit Volume or Joint Appendix.

jurisdiction over metropolitan Buffalo. Through their National Union, the New York state locals of CWA have had a collective bargaining relationship with the employer, New York Telephone Company, since 1961. The collective bargaining agreement is negotiated only on a statewide basis by the National Union (A. 4). The current contract is effective from July, 1974-1977 and contains the standard provision that a waiver of any portion of that agreement must be signed by the parties to the contract (A. 4).

Within the jurisdiction of Local 1122 the employer has appointed bargaining unit personnel to the position of temporary supervisor. This practice began in 1962 (E. 23), and both union and non-union employees are appointed. In their contracts the parties have included the following provision (Article 8):

> "The Company may transfer or assign, temporarily or permanently, any employee from an occupational classification to another, or from one assignment to another within the same occupational classification, or from an occupational classification to a position outside of the bargaining unit either as a step in force adjustment or for other purposes." (E. 6).

Various locals, as early as 1967, contested this proviso as a guaranteed right of the employer to appoint temporary supervisors (A. 147-148). The employer

admits that bargaining unit personnel have always been free to refuse such appointments (A. 125-126). Moreover, the National Union's Constitution, Article V, § 4(a), requires that union membership be terminated if any member acts as a temporary supervisor for a period exceeding 30 days (E. 12).

Local 1122 became concerned with the temporary supervisor practice in 1968-69. The membership believed the practice was destructive of union loyalty, creating strife and discord among members who were supervisors one day and bargaining unit personnel the next (E. 123-125). The use of temporary supervisors also seemed to decrease promotional opportunities to permanent supervisory positions since fewer permanent supervisors would be needed to cover for temporarily absent foremen (E. 123-125). Indeed, once a ban against temporary supervisors was adopted, the employer promoted an unusually large numer of employees to permanent foremen (A. 221).

In 1969 Local 1122 was contemplating action to stem the rising use of temporary supervisors. Knowing this (A. 211-214), the employer approached the leadership of Local 1122 with a proposal (A. 211-218). The employer offered to limit its use of temporary supervisors within the

jurisdiction of Local 1122, or to enter into such an agreement with other locals in Western New York or throughout all of Upstate New York. The proposal was not made to the National Union, the statewide bargaining representative of Local 1122. Only the individual locals were asked to come to terms over temporary supervisors.

After discussing the proposal the membership of Local 1122 voted to reject the employer's offer and initiated a ban against its members accepting temporary supervisor appointments (A. 211-218; E. 123-125). Non-union employees were free to accept or reject the appointment, as always had been the case.

Notice of the ban was given to all union members and to third level management (A. 218-219). The employer never protested the ban; instead, no temporary supervisors were appointed within the jurisdiction of Local 1122 until 1973 (E. 21-23). * The employer then gradually recommenced its use of temporary supervisors. Local 1122 never rescinded its ban, but constantly maintained its opposition to the employer's use of temporary supervisors (A. 218). When it

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* Local 1122 was on strike only from July 4, 1971 to February 18, 1972.

became evident that the employer was abandoning its acquiescence to the union rule, Local 1122 found it necessary to enforce the ban. Intra-union charges were brought against Richard McVie in July of 1975 for accepting a temporary supervisor appointment (E. 18-19). The penalty for violating the rule is a fine or expulsion from the union (E. 17). Under the union's rule both union and non-union employees can return to their bargaining unit position when the temporary supervisor appointment expires. There is no effect upon their employment status with the employer.

In response to the union's charges against McVie the employer accused Local 1122 of unfair labor practices under the National Labor Relations Act, § 8(b)(1)(A), (B)* and § 8(b)(3).** A complaint and notice of hearing were issued by the regional director's office initiating the proceedings which have lead to this appeal.

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* 29 U.S.C. § 158(b)(1)(A), (B).

** 29 U.S.C. § 158(b)(3).

POINT I

EMPLOYEES REPRESENTED BY LOCAL 1122 NEVER ADJUSTED A GRIEVANCE WHILE SERVING AS TEMPORARY SUPERVISORS. THEREFORE THE BOARD ERRED IN SUSTAINING THE SECTION 8(b)(1)(B) CHARGE. IN A CONTEST OF LOYALTIES CREATED BY AN EMPLOYER'S USE OF TEMPORARY SUPERVISORS, THE SOLUTION LIES IN § 14(a) AND NOT UNFAIR LABOR PRACTICE CHARGES.

The National Labor Relations Act, 29 U.S.C. § 151 et seq., provides in Section 8(b)(1)(B) an unfair labor practice for any labor organization or its agents to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." This prohibition seems plain enough. Yet problems arise when a union attempts to discipline a member who is also a "supervisor" within § 2(11) of the Act.

In response the National Labor Relations Board has applied § 8(b)(1)(B) quite liberally in protecting supervisor-members from union discipline. San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.), 172 NLRB 2173 (1968). The Board sees the section "as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests

of their employers." Toledo Locals No. 15-P & 273, etc. (Toledo Blade Co., Inc.) 175 NLRB 1072, 1080 enforced 437 F.2d 55 (6th Cir. 1971). But the use of § 8(b)(1)(B) as a shield from union discipline of supervisor-members is now seriously questioned. See Florida Power and Light Company v. IBEW, 417 U.S. 790 (1974). In reviewing the legislative history of § 8(b)(1)(B) the Supreme Court stated:

> "Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the selection of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." Id., at 804-805 (emphasis original).

The Court has made it clear that unless a supervisor-member performs collective bargaining or adjusts grievances on behalf of his employer, then § 8(b)(1)(B) is no bar to union discipline.* Local 1122 members have never

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* In Florida Power & Light, the Supreme Court did not decide, but merely "assumed" that in Oakland-Mailers', supra the employees who were "coerced" had engaged in collective bargaining or grievance adjustment, thus satisfying the Court's interpretation of § 8(b)(1)(B). Florida Power & Light, supra at 805.

adjusted grievances during their temporary supervisor appointments.* Consequently, the ban against accepting such appointments is not a violation of § 8(b)(1)(B). In the aftermath of Florida Power & Light, a mere finding that a position is "supervisory" viz. § 2(11), without more, can no longer support a § 8(b)(1)(B) charge against a union that prohibits members from holding a § 2(11) position. It must be shown that the supervisor-members actually performed one of the two activities of § 8(b)(1)(B).

A. Considering the Entire Record, Bargaining Unit Employees Represented by Local 1122 Have Never Adjusted Grievances as Temporary Supervisors.

No bargaining unit employee ever adjusted grievances as a temporary supervisor. The employer and General Counsel for the Board offered General Counsel exhibits 19, 20, 21, and 28-47 (E. 31-43, 62-106) as proof they had. Yet each of those exhibits fails in its express purpose. General Counsel

* Not all bargaining unit employees are union members. Thus the employees appointed temporary supervisors are both union and non-union. The ban established by Local 1122 is aimed only at employees who are members of Local 1122. But the proof adduced at the hearing shows that neither union nor non-union employees ever adjusted grievances while acting as temporary supervisors within the jurisdiction of Local 1122. All parties agree that the temporary supervisors do not engage in collective bargaining.

exhibits 28-47 are the source of the compilation of data comprising General Counsel exhibit 19 (E. 31, 62-108). But none of the grievances on General Counsel exhibit 19 involved temporary supervisor appointments in metropolitan Buffalo, the territorial jurisdiction of Local 1122 (E. 31-33). General Counsel exhibit 19 is thus insignificant. Its probative value on grievance adjustment by temporary supervisors extends only to locals other than 1122. And only Local 1122, petitioner herein, has been charged with unfair labor practices (A. 2).

The employer's general manager for the western area, and the principal General Counsel witness, James Hennessy, testified in his seventeen years with the employer he knows of no other temporary supervisors who adjusted grievances other than those appearing on general counsel exhibit 19 (E. 38-39).

Another General Counsel witness, Roy Jordan, testified as a member of Local 1122 he accepted at least three temporary supervisor appointments (A. 119-120). Yet when asked if he could recall any instances where a temporary supervisor actually convened and sat in at the first step grievance he replied "not to my knowledge." (A. 139).

Only General Counsel exhibits 20 and 21 (E. 40-43)

pertain to Local 1122. Yet they prove only that the grievance arose when a temporary supervisor was foreman. For those grievances the management committee was G. J. Schoenhart and F. J. Kroboth, both of whom are permanent foremen (E. 46-47). The grievances comprising general counsel exhibits 20 and 21 were not adjusted by an acting supervisor.

Jordan subsequently admitted it is customary for the supervisor to sit in on the first step grievance "provided he is in his permanent location." (E. 59). Yet from all of the employers records for the western area, only General Counsel exhibits 20 and 21 were offered as proof that employees represented by 1122 adjusted grievances as temporary supervisors. Nevertheless, it was admitted in those two instances the grievance was not heard by the acting supervisor, but rather by two permanent foremen. Thus no proof exists that Local 1122 represented employees who adjusted grievances as temporary supervisors. The employer argues it has appointed temporary supervisors from Local 1122 for 15 years. If this is true it seems incredulous no one could testify to a specific instance, or produce documentary evidence, of a Local 1122 employee adjusting a grievance as a temporary supervisor. The only logical conclusion is that they have not adjusted grievances during appointments as temporary

supervisor. The exhaustive search of payroll records conducted by the employer, which produced General Counsel's exhibits 19-21, support this conclusion. We respectfully submit the employer and General Counsel have failed to prove any adjustment of grievances by temporary supervisors from Local 1122.

There is thus no substantial evidence, viewing the record as a whole, to support the Board's determination that Local 1122 has violated § 8(b)(1)(B). See 29 U.S.C. § 160(e). The practice between the employer and other locals is irrelevant. Only Local 1122 has been charged with violating § 8(b)(1)(B).

Local 1122 employees who have accepted temporary supervisor appointments have not adjusted grievances. Since this is the only activity of the employer protected by § 8(b)(1)(B) (other than collective bargaining), Local 1122's ban does not invade an interest of the employer protected by that provision. In the face of Florida Power & Light, supra, and this lack of evidence, this Court must dismiss the § 8(b)(1)(B) charge.

B. Other than Collective Bargaining, Section 8(b)(1)(B) Protects Only the Exercise of Supervisory Judgment in Grievance Adjustment. Its Coverage Does Not Extend to Any Other Supervisory Function under § 2(11), Nor to Any Non-Supervisory Involvement in Grievance Adjustment.

As noted, there must be some grievance adjustment power vested in a § 2(11) supervisor before union activity may be condemned as a violation of § 8(b)(1)(B). This means the power to adjust grievances must, in fact, be exercised and in a supervisory manner.

> "What is included in the meaning of the statutory language, we think, is the use of independent judgment in collecting, analyzing, evaluating and considering pertinent data for the purpose of determining the validity of a grievance . . . ." NLRB v. Brown & Sharpe Mfg. Co., 169 F.2d 331, 334 (1st Cir. 1948).

None of the exhibits satisfy this criterion. Donald E. Wagner, Supervisor, Personnel Relations, testified that temporary supervisors were instructed always to accept a grievance when presented by a union steward or member (A.157-158). Thus, no independent judgment was exercised by

temporary supervisors in accepting grievances. Testimony that temporary supervisors do what permanent foremen do is insufficient.* The record does not reflect that temporary supervisors, in or outside of the jurisdiction of Local 1122, exercise independent judgment in resolving a grievance. The record only shows temporary supervisors are mere conduits of grievance information. They possess as much substantive power to adjust grievances as an office suggestion box. In other words, they are merely depositories for the filing of grievances and, in some instances, the parroting of answers. Section 8(b)(1)(B) does not protect such activity on behalf of the employer. Where there is, in fact, no grievance adjustment, there is no employer interest protected by §8(b)(1)(B).

Testifying as to the brief indoctrination given to acting supervisors by the employer, James Hennessy could not state that acting supervisors were told to use their own judgment in resolving grievances (A. 91). Their instructions dealt only with familiarization with the procedural aspects of the grievance procedure, e.g., "getting the number for it etc." (A. 89). In fact, acting supervisors were not always indoctrinated as to the administration of the collective bargaining agreement (A. 88-89).

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* Exercise by a temporary supervisor of the criteria contained in § 2(11) is clearly not proof of a § 8(b)(1)(B) violation. Florida Power & Light, n.21 at 811.

Furthermore, only "routine" grievances were handled by permanent foremen (A. 91). The handling of minor complaints does not constitute the adjustment of grievances, even where no consultation is had with an immediate boss. Cinch Mfg. Co., 98 NLRB No. 118 (1952). Hennessey testified that permanent supervisors must be guided by experience (A. .93), or by consulting a boss, to ascertain if they even had authority to do anything with regard to a grievance presented to them (A. 93-94).

Acting as a management "conduit" does not suffice for § 2(11) supervisory status. Mademoiselle Shop, Inc., 199 NLRB No. 147 (1972) (office clerk). Acting as a grievance conduit, without the exercise of independent judgment on behalf of the employer likewise does not require the protection of § 8(b)(1)(B). Just as there are instances where certain jobs require minor supervisory functions lacking genuine management prerogatives, which thus cannot properly be called "supervisory" under § 2(11) of the Act, likewise there are supervisory positions within § 2(11) which require only minor or clerical duties in relation to the adjustment of grievances and thus cannot properly be entitled to a place under the protective umbrella of § 8(b)(1)(B). Florida Power & Light, supra n.21 at 811. Such is the case

with regards to the position of temporary supervisor. Thus union action in regard to temporary supervisors cannot be a § 8(b)(1)(B) violation if they do not perform grievance adjustment duties which require the exercise of independent supervisory judgment on behalf of the employer. There can be no prohibited restraint or coercion when the activity to be protected is never engaged in by those allegedly restrained.

Therefore, regardless of the practice within Local 1122, see pp. 3 - 6 supra, the record in relation to other locals shows no temporary supervisor who exercised supervisory judgment in dealing with grievances. General testimony that temporary supervisors do what permanent supervisors do is inadequate. The Board itself has always held that titles, labels and the use of straw bosses do not suffice as evidence of supervisory authority. The same reasoning must apply to grievance adjustments.

C. The Rule Against Temporary Supervisors is a Proper Labor Weapon Under Section 14(a).

This § 8(b)(1)(B) charge is essentially a response to the distraction of loyalty contest engaged in between

Local 1122 and the employer. A contest for loyalty is always present in such a context. But the Court declared in Florida Power & Light that such issues are resolved not by §8(b)(1)(B), but by application of §§ 2(3), (11) and 14(a).

> "But it is quite apparent, given the statutory language and the particular concerns that the legislative history shows for what motivated Congress to enact §8(b)(1)(B), that it did not intend to make that provision any part of the solution to the generalized problem of supervisor-member conflict of loyalties." Florida Power & Light, 417 U.S. at 813. (emphasis original).

This employer voluntarily seeks out bargaining unit employees to act as temporary supervisors. If temporary supervisors do not act with the loyalty of permanent supervisors, certainly the employer cannot complain. The employer has the choice of avoiding such a loss of supervisory loyalty by halting its use of temporary supervisors and increasing the number of permanent supervisors. (See respondent's exhibit 18 at E.123). Section 14(a) of the Act preserves this choice. The employer receives protection from §8(b)(1)(B) in this context only when the supervisor-members undertake the adjustment of grievances on a supervisory level. General Counsel's exhibits 19-21 do not show that such activity is engaged inby temporary

supervisors. See pp. 3 - 10 , supra.

Of the 537 occasions from 1962-1975 when Local 1122 members were appointed temporary supervisors (see General Counsel exhibit 16 at E. 21-23), only General Counsel exhibits 20 and 21 were produced to show the adjustment of grievances within Local 1122; yet even those grievances were resolved by permanent supervisors. See supra. Obviously, then, the ban does not interfere with any employer activity, performed by Local 1122 temporary supervisors, that is protected by § 8(b)(1)(B). The key to this employer's dilemma lies in its decision to use bargaining unit employees as temporary supervisors. See CCH Lab. L. Rep. ¶9069 (1976); 52 J. of Urban L. 802 (1974-75).

General Counsel does not contend that permanent and temporary supervisors are affected by the ban in the manner of their performance of supervisory duties. Once appointed, the ban permits temporary supervisors to carry out their duties unmolested. The fine is levied only when the appointment is accepted. No further penalty is imposed contingent upon the manner of performance of supervisory functions.

Local 1122's ban has a lawful primary objective-the preservation of its members loyalty. Its ban is a proper labor weapon exercised pursuant to its correlative prerogative under §14(a) of the Act. Florida Power & Light, 417 U.S. at 812-813.

Unlike the administrative law judge, the Board did not point to any specific evidence to support its conclusion that temporary supervisors appointed from Local 1122 actually adjusted grievances. It merely opined a dissimilar conclusion. But this Court can no longer permit such whimsical administrative reversals. The Board's disagreement with the United States Supreme Court as to the breadth of the application of §8(b)(1)(B), compare Oakland-Mailers' with Florida Power & Light, cannot be ignored by the Courts of Appeal. Where, as here, a difference with the Court and statutory policy is manifest in the Board's opinion, the courts of appeal have a duty to deny enforcement. Reviewing courts in NLRB cases must not "rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291 (1965). This

is the intent of 29 U.S.C. § 160(e). Upon all of the evidence no Local 1122 employee ever adjusted a grievance as a temporary supervisor. Upon all of the evidence no temporary supervisor in the employer's western region exercised supervisory judgment in relation to grievances. The entire record bears out these conclusions. But by ignoring the totality of the record the Board attempts escape of the Florida Power & Light decision. The Board continues to apply its reasoning in Oakland-Mailers' and Toledo Blade Co., by a manipulation of evidence. It seeks enforcement against an alleged § 8(b)(1)(B) violation in a case where the evidence is legally insufficient that those allegedly restrained ever adjusted grievances. Florida Power & Light forbids enforcement in such cases. Local 1122 requests this Court recognize the evidential bankruptcy with regards to employees in its territorial jurisdiction adjusting grievances as temporary supervisors, and to dismiss the § 8(b)(1)(B) charge.

POINT II

THE EMPLOYER FAILED TO PROTEST AGAINST THE LOCAL'S RULE AND CO-OPERATED IN ITS ADMINISTRATION FOR ALMOST THREE YEARS, THUS WAIVING ITS SECTION 8(b)(3) RIGHTS.

The labor organization's bargaining obligation is defined in §8(d). Nevertheless, the cases recognize an employer may waive its collective bargaining rights under §8(b)(3) and 8(d). Where there is a failure to protest unilateral action, or a "failure to request bargaining despite knowledge of a contemplated unilateral change," a waiver of bargaining rights is implied. See e.g., Justenson's Foods Store, Inc., 160 NLRB 687 (63 LRRM 1027, 1028) (1966); The Developing Labor Law at 332-338 (Morris ed. 1971). Past practices of the parties might also reflect a waiver. The Developing Labor Law, supra at 333. Nor is it always necessary the employer be given formal notice of the intended unilateral change when, as a matter of fact, it already knows of the contemplated change. Id., at 337. Thus a union has the right to rely upon an employer's acquiescence in any changes particularly where, as here, the employer has not protested the change for more than three years and that period encompasses the negotiation of a new collective bargaining agreement (cba).

Like Local 1122, other locals throughout the state have sought to limit or terminate this employer's practice of using temporary supervisors. As early as 1967, Local 1103 had imposed a ban on the acceptance of temporary supervisor appointments (A. 147).* In early 1969 the tri-local council, comprised of the executive membership of Locals 1115, 1117 and 1122, agreed to approach its membership regarding a ban similar to Local 1103's (A. 211). Before this could be accomplished, employer representatives approached officers of Local 1122 with a proposal to limit the use of temporary supervisors (A. 211). The employer was willing to make the agreement on a local level, or with the three locals in Western New York, or as part of an agreement with all locals in upstate New York (A. 211-212).

Paul McGavis, then President of Local 1122, went before the executive board of that local with the employer's proposal. In addition, other locals in the upstate region were polled for membership reaction to the employer's proposal (A. 216). At the next meeting of the full membership of Local 1122 the employer's proposal was rejected and the ban of temporary supervisor appointments was adopted (A. 217-218).

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* The record reflects no effort by the employer to eliminate that ban which was in effect before, during and after negotiations for a new cba in 1968 (A. 147-148).

The results of the vote were published in Local 1122's newspaper and mailed to third level management (A. 218-219).

In response to this ban the employer did not use any temporary supervisors from Local 1122 in 1970 and 1971, and appointed only one temporary supervisor in 1972 (A. 105; see also General Counsel exhibit 16 at E. 21).* During this three year period the employer never protested Local 1122's new rule. The employer clearly waived its bargaining rights over the ban. Since this rule has been in continuous effect since 1969, the employer cannot now reclaim its discarded alleged right, except through the process of collective bargaining, which has not occurred. It became a term and condition of employment within the jurisdiction of Local 1122 that bargaining unit people were not appointed temporary supervisors. When the employer again gradually undertook the use of temporary supervisors in metropolitan Buffalo (17 in 1973, 30 in 1974, E. 21-23) the ban was still in effect, a verbalization of Local 1122's objections to such a practice. Local 1122 had a right to rely upon the employer's continued acquiescence in the rule.

Moreover, the new cba was negotiated by the statewide bargaining representative and the employer effective July 18, 1971. See General Counsel exhibit 3. No mention

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* This abstention is only partly explained by the fact that CWA was on strike from July 14, 1971 to January 18, 1972 (A. 149).

was made during those negotiations of the ban imposed by Local 1122 (A. 144); no protest was launched by the employer. This further justifies Local 1122's reliance upon the ban as change acquiesced in by the employer. When the use of temporary supervisors by the employer recommenced briefly in 1973 and on a wholesale basis in 1974-75, Local 1122 was compelled to enforce its ban. The employer had been on notice since 1969 that Local 1122 considered the abstained use of temporary supervisors as the status quo.

Now the employer has attempted to sidestep its waiver of bargaining rights over the ban, and the establishment of a practice of using only permanent foremen within Local 1122's jurisdiction, by arguing that the use of temporary supervisors is a contractual right that can only be modified through bargaining on a statewide level. But in accepting this argument the Board has ignored some principal considerations.

First, if the employer considered Article 8 of the cba as a guarantee to use temporary supervisors, then why did the employer refrain from enforcing that alleged right in a §301 suit (Labor-Management Relations Act, 29 U.S.C. §185)?* The employer had an opportunity to do so in 1967 when Local 1103 imposed its ban, as well as during the tenure of Local 1122's ban. The failure to file a §301 suit reflects the

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* Also, the employer could have initiated an employer grievance under the cba.

employer's interpretation of Article 8 as something other than establishing a right to use temporary supervisors.

Having waived its bargaining rights under §8(b)(3) and 8(d), a §301 suit is the principal forum for relief now available to the employer. Local 1122 has not engaged in any unfair labor practices. The real point of contention is the meaning and scope of Article 8 of the cba in light of the parties' practice of use, non-use and recommenced use of temporary supervisors. No evidence, such as negotiation minutes, establishing this alleged right were presented. The employer presented no collective bargaining history as to the meaning of Article 8. This provision of the present cba is found in every cba since at least 1964. See General Counsel exhibit 6 (E. 10-11). What the language means in relation to the day to day affairs of the employer and Local 1122 members is a matter for arbitration or a §301 suit, not unfair labor practice charges.

Second, it is obvious the employer knowingly sought to bargain on a local or regional level with regard to temporary supervisors (A. 211-212). Since the employer knows the cba can be modified only by signed agreement with the statewide representative of CWA, its proposals to Local 1122 is recognition of the fact that Article 8 of the cba is not a guarantee to use temporary supervisors. It must be presumed the

employer would not voluntarily bargain away what it already contractually owned, or fail to enforce an important contractual right per §301, or seek a Local's concurrence in a void agreement. Yet the Board neither acknowledged nor explained these considerations, adding further to the arbitrary character of its determination.*

There is only one conclusion consistent with all of the evidence surrounding Local 1122's ban on temporary supervisors, including the employer's response. The latter can only be explained as both a tacit admission that the use of temporary supervisors is not a contract right and as a waiver of §8(b)(3) and 8(d) rights. The employer's prior actions belie its present contentions.

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*The Board's arbitrary treatment of the record is obvious through its misinterpretation of evidence. For example, the Board described General Counsel exhibit 8 (E. 12) as an attempt by the National Union to oppose the locals in their efforts "to unilaterally modify the contract by banning the assignment of temporary supervisory positions." (Board opinion, n.6 at A. 7). A simple reading of General Counsel exhibit 8, however, reveals its treatment of an entirely different matter. That exhibit does not characterize the efforts of Local 1127 as a unilateral modification of its cba. Nor is General Counsel exhibit 8 an interpretation of the cba. Indeed, this exhibit supports the position of Local 1122 insofar as it permits the banning of temporary supervisors by various locals so long as the 30 day rule of the CWA Constitution is amended. There is no indication by the National Union that it considers the ban a violation of the cba or at odds with the National Union's policy regarding temporary supervisors. The Administrative Law Judge correctly noted the exhibit's general irrelevancy to the unfair labor practice charge (E. 13-15).

An interpretation of the employer's prior actions as evidence of acquiescence in the union rule is supported by the Board's decision in Westgate Painting & Decorating Corp., 186 NLRB No. 140 (1970) enforced sub nom N.Y.Dist. Council No. 9 v. NLRB, 453 F.2d 783 (2d Cir. 1971) cert. denied, 405 U.S. 988 (1972) (herein referred to as Westgate). In Westgate the Board labeled certain actions of the employer, undertaken in response to the union rule, as proof that there was no employer acquiescence. In response to the production quota rule levied by the union, the employer in Westgate "discharged painters who reduced their out-put to observe the rule. On several occasions, employees were docked for time not worked when they left the job after completing the 10 room quota." Westgate 186 NLRB No. 140, 1970 CCH Lab. L. Rptr. ¶22,511 at 29,082. There is no similar evidence of employer resistance to this union's rule.

Moreover, in Westgate the parties bargained and failed to reach an agreement during the cba negotiations regarding the subject matter of the union rule. Subsequently, a unilateral change was attempted. Thus the Board stated in Westgate that it did not reach the question of the legality of the union rule prior to the cba negotiations. Id., at p.29,083. Yet that unanswered issue is presented

in the present appeal. The 1969 ban instituted by Local 1122 was prior to formal cba negotiations in 1971 where the subject of temporary supervisors was not discussed; the union's rule was in effect and the employer was then cooperating in the rule by not appointing temporary supervisors from that unit. After Local 1122 adopted its rule, the employer signed contracts that did not reject the local's position and indeed cooperated with the local rule by abstaining from temporary supervisor appointments within the jurisdiction of Local 1122 for two or three years. We see no evidence that the employer did anything other than waive its right to bargain over the union's rules.

Furthermore, the Board's reliance upon Rochester Telephone was misplaced. See NLRB v. CWA, Local 1170, 474 F.2d 778 (2d Cir. 1972). Herein, Local 1122 has refused to enter into the kind of agreement executed in Rochester Telephone. Id., at 781. And Local 1122 has never withdrawn its demand to abolish the temporary supervisor practice. Id. Without any evidence of a quid pro quo exchange to support the practice, as was found in Rochester Telephone, supra, that decision is inapposite. That lack of evidence, taken in conjunction with the employer's acquiescence in the rule for two to three years, creates in favor of Local 1122 a right to rely upon the employer's abstention from appointing

temporary supervisors within its jurisdiction.

The rule was acquiescenced in by inaction on the part of the employer and subsequent cooperation with the rule. Consequently this employer waived its collective bargaining rights. By enforcing its rule Local 1122 has not contravened §8(b)(3) and §8(d) of the Act. Those charges must be dismissed.

POINT III

NO EMPLOYEES ARE "RESTRAINED OR COERCED" IN THE EXERCISE OF THEIR SECTION 7 RIGHTS BY THE ALLEGED REFUSAL TO BARGAIN.

A. Local 1122 Enforces its Rule Only Against Supervisor-Members. They Are Not Within the Coverage of Section 8(b)(1)(A).

The NLRA, § 8(b)(1)(A), makes it an unfair labor practice for a labor organization:

> "To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"

Only "employees" as defined in § 2(3) are protected by § 8(b)(1)(A). This excludes all "supervisors" under § 2(11). See Beasley v. Food Fair of North Carolina, 416 U.S. 653 (1974). Thus temporary supervisors are not protected by § 8(b)(1)(A). As long as members of Local 1122 remain "employees," consistent with the Local's rule, they are protected in their § 7 rights; but when they accept appointments

as temporary supervisors, in violation of the rule, they become "supervisors" under § 2(11), thereby losing their § 8(b)(1)(A) rights.

Local 1122 only enforces its rule against supervisor-members, not employee-members, and the former are not covered by § 8(b)(1)(A). The permissible scope of union discipline under § 8(b)(1)(A) was construed in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

> "[But] (t)he decision in that case is inapposite where the union seeks to fine not employee-members but supervisor-members, who are explicitly excluded from the definition of 'employee' by Section 2(3), 29 U.S.C. § 152(3), and hence from the coverage of § 8(b)(1)(A)." Florida Power & Light, supra n. 16 at 805.

Union disciplining of supervisor-members cannot be an unfair labor practice under § 8(b)(1)(A).

B. A Refusal to Bargain Is Not Restraint or Coercion Prohibited by Section 8(b)(1)(A).

In sustaining the § 8(b)(1)(A) charge the Board reasoned that Local 1122's alleged violation of § 8(b)(3) and § 8(d) "also constitute(d) restraint and coercion . . . "

(Board Opinion, A. 7). Acceptance of this logic requires every § 8(b) violation to result in a § 8(b)(1)(A) charge. Yet this results in a tortured construction of § 8(b)(1)(A), one at variance with Board and Supreme Court precedent.

Section 8(b)(1)(A) was not intended to be a catch-all provision used to shadow or "double up" other § 8(b) charges.

> "[I]n its earliest decision under that section, National Maritime Union *, the Board concluded that violations of other sections of Section 8(b) did not give rise to derivative violations of Section 8(b)(1)(A).
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> * * *
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> "This relatively narrow construction of Section 8(b)(1)(A) was given specific approval by the Supreme Court in Curtis Bros. **" The Developing Labor Law, supra at 68-69.

Examining the legislative background of § 8(b)(1)(A), its intended scope and its relationship with other § 8(b) violations, in particular § 8(b)(3), the Board in National Maritime Union held:

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* 78 NLRB 971, 22 LLRM 1289, enforced 175 F.2d 686 (2d Cir. 1949) cert. denied 338 U.S. 954.

** NLRB v. Drivers Local 639, 362 U.S. 274, 285-291 (1960).

> "This legislative history strongly suggests that Congress was interested in eliminating physical violence and intimidation by unions or their representatives, as well as the use by unions of threats of economic action against specific individuals in an effort to compel them to join. Nothing in this legislative history indicates that a union which refuses to bargain is to be considered as having per se 'restrained' or 'coerced' employees in the exercise of their rights guaranteed in Section 7, particularly where, as in this case, the finding of refusal to bargain is bottomed solely on the union's insistence upon a demand for a provision which is found to be unlawful." Id., (22 LRRM at 1300). (emphasis supplied).

A refusal to bargain conceivably might interfere with an employee's exercise of § 7 rights, but an amendment making it an unfair labor practice "to interefere" as well as "to restrain or coerce" § 7 rights was dropped during Congressional debate. See NLRB v. Drivers Local 639, 362 U.S. at 285. Therefore, Local 1122's alleged refusal to bargain over its rule does not "restrain or coerce" the exercise of employees' § 7 rights.

POINT IV

THERE IS NO SECTION 8(b)(1)(A) VIOLATION SINCE THE LOCAL'S RULE AFFECTS ONLY THE UNION MEMBERSHIP STATUS OF SUPERVISOR-MEMBERS, PRESERVES RESPECTIVE LOYALTIES IN ACCORD WITH SECTIONS 2(3), (11) AND 14(a), AND IMPAIRS NO STATUTORY LABOR POLICY.

A. Local 1122 Enforces its Rule Only Through Intra Union Mechanisms, Permitting the Temporary Supervisor-Member to Leave the Union but Retain His Employment. It has No Effect Upon the Employer-Employee Relationship. Moreover, the Rule Advances Legitimate Union Interests by Increasing Promotions to Permanent Foremen and Preserving Union Loyalty.

The legitimacy of union fines under § 8(b)(1)(A) was tested in Scofield v. NLRB, 394 U.S. 43 (1969). The Supreme Court held that § 8(b)(1)(A):

> "[L]eaves the union free to enforce a properly adopted rule which (1) reflects a legitimate union interest, (2) impairs no policy Congress has imbedded in the labor law, and (3)

> is reasonably enforced against union-members who are free to leave the union and escape the rule." Id., at 430.

Local 1122's fine succeeds on all counts. This local, like all unions, has an overriding interest in preserving the loyalty of its members. The rule also prevents strife and internal discord among the membership when bargaining unit employees are temporarily promoted to supervisory positions only to return to the bargaining unit.*

Local 1122 enacted this rule partly to insure a consistency with the preservation of primary loyalties created by Congress' redrafting of § 2(3) and (11). The legislative history of these definitions, and the enactment of § 14(a), indicate the applicable congressional policy:

> "[N]o one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust. House Report 14-17." Florida Power & Light, supra at 810-811.

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*If the exclusion of § 2(11) supervisors from the Act's protection, the stated congressional policy, is based upon the need to preserve loyalty to the employer, then clearly enough the use of temporary supervisors (who sometimes return to employee status) exacerbates the legitimate need of the union for membership loyalty and solidarity. The manifest resentment of employees to be supervised by their fellow employees, albeit "temporarily", obviously makes trouble and nurtures division in the employee ranks.

Section 14(a) means to govern the contest of loyalty among supervisor-members. It permits an employer to forbid union membership among supervisory personnel, or "permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining." Florida Power & Light, supra at 813 (emphasis added).

This conflict arises out of the employer's choice to use temporary supervisors. But as the Supreme Court pointed out, a union's response to the employer's choice is not likely to be a violation of § 8(b), but instead a matter for collective bargaining, arbitration or § 301 enforcement suits (See 29 U.S.C. § 185). Id. * Down those procedural avenues lies the solution to the temporary supervisor dilemma. The road toward § 8(b) is a path wrongly chosen.

Another purpose of Local 1122's rule is an increase in promotional opportunities for union members. See respondent's exhibit 18 (E. 123). If the temporary supervisor position is eliminated then the employer will have to increase the number of permanent foremen. This in fact was

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* See Point II supra atp.18.

the case when Local 1122 adopted its ban in 1969. It resulted in a noticeable increase in the number of permanent supervisory promotions (A. 221).

The mandate of Scofield that union fines advance legitimate union interests is therefore satisfied. The rule rectifies the ill effects of the temporary supervisor practice upon the membership. Additionally, it protects the promotional rights of the membership by increasing their opportunity for permanent supervisory appointments.

Nor does Local 1122's fine affect the temporary supervisor-member's status with the employer. The supervisor-member is entirely free to leave the union and escape the fine. No evidence to the contrary was presented. Those temporary supervisors who remain in the union are subject only to enforcement of the rule through intra-union mechanisms. Scofield, supra at 430-431. The rule is enforcable solely through "the internal technique of union fines." Id. No party has contested otherwise. Local 1122's fine is thus consistent with § 8(b)(1)(A).

B. A Limitation on Temporary Supervisor Appointments Impairs No Statutory Labor Policy.

The Board incorrectly reasoned that Local 1122's fine impaired statutory labor policy because it enforced a refusal to bargain. * The primary objective of the fine, however, is not that, but to enforce a prohibition against temporary supervisor appointments. That objective is the union conduct to be measured for "impairment of a statutory labor policy." Scofield, supra. The issue is whether this local may accomplish that goal by use of intra-union fines. Whether the union's conduct includes a refusal to bargain is a separate, autonomous issue under § 8(b)(3). See Point II, supra.

A limitation on temporary supervisors is not an end which impairs statutory labor policy. Neither General Counsel nor the employer argue otherwise, nor has the Board

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* Even accepting the Board's interpretation of the Scofield test, there is no § 8(b)(1)(A) violation. The employer waived his bargaining rights leaving no impairment of statutory policy to support a § 8(b)(1)(A) charge. See Point II, supra.

in its decision. Thus, if that goal is achieved solely by intra-union techniques and advances legitimate union interests, there is no violation of § 8(b)(1)(A).

Article V, § 4(a) of the CWA Constitution terminates union membership upon the acceptance of any temporary supervisor position that exceeds 30 days. (See General Counsel exhibit 8 at E. 12). The employer does not contend this is a violation of § 8(b)(1)(A). Yet what is the difference between this proviso and Local 1122's rule, except for the 30 day interim? Article V, § 4(a) has never been attacked as a violation of § 8(b)(1)(A) during all the years in which CWA has been the certified bargaining representative. Nevertheless, such an attack is now made upon the local's rule. But the legality of that rule should not rest upon the length of the temporary supervisor appointment.

Moreover, this constitutional provision is instructive in the parties' practice over temporary supervisors. Apparently, temporary supervisors have always lost their membership upon accepting temporary supervisor appointments of more than 30 days. The change by Local 1122 to a shorter incubation period, or its elimination, provokes no bargainable effect. Members now, as always, can still accept

appointments as temporary supervisors for less than or exceeding 30 days. The response by the union remains the same; the employment status of the temporary supervisor remains the same. Only his relationship with the union is altered, as it always had been for appointments exceeding 30 days. Non-union employees remain unaffected by the ban.

The record also shows that temporary supervisor appointments are voluntary. Any employee, either union or non-union, can refuse the employer's offer (A. 125-126). Local 1122's rule does not eliminate that choice. Non-union employees can ignore the rule while every union member is "free to leave the Union and escape the rule", Scofield, 394 U.S. at 430, gaining temporary managerial benefits and job advancement credits that union adherents voluntarily choose to reject.

> "If a member choses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits and job advancement and extra pay may result from extra work, at the same time enjoying the protection from competition . . . . which compliance with the union rule by union members tends to promote.

> That the choice to remain a member results in differences between union members and other employees raises no serious issue under . . . the Act, because the union has not induced the employer to discriminate against the member but has merely forbidden the member to take advantage of benefits which the employer stands willing to confer." Scofield, supra at 435 (emphasis supplied).

In NLRB v. Philadelphia Iron Works, Inc., 211 F.2d 937 (3d Cir. 1954), the union required by rule that the employer hire only union members in good standing who were referred by the union. The coercive effect was to encourage membership in that labor organization. The court correctly found the rule within the prohibition of § 8(b)(1)(A), and in doing so was consistent with the Board's interpretation in National Maritime Union and NLRB v. Drivers Local 639, supra. The establishment of an employer-employee relationship hinged upon the union rule and thus exceeded the permissible scope of the provision in § 8(b)(1)(A). Local 1122's rule neither rests upon similar motives, nor upsets the employment opportunities of the employees, both union and non-union. Their choice to accept or reject temporary supervisor appointments remains intact. Being entitled to the primary loyalty of its members under § 14(a), and to protect the promotional opportunities of its members to

permanent foremen positions, see supra, Local 1122 may exact as the price of seeking temporary supervisor positions the loss of union membership. Non-union employees pay no penalty by accepting the position, and thus cannot possibly be "restrained or coerced" in any fashion by the rule.

Thus, the rule violates no statutory policy, is internally enforced and serves legitimate union interests. Consequently, there being no basis for the § 8(b)(1)(A) charge, it was correctly dismissed by the administrative law judge whose decision should be reinstated by this Court.

CONCLUSION

Petitioner-respondent, respectfully requests this Court to deny the Board's cross-application for enforcement of its order. Petitioner further requests this Court to dismiss the unfair labor practice charges against it because the Board's determination with respect to questions of fact is not supported "by substantial evidence on the record considered as a whole", 29 U.S.C. § 160 (e); moreover, the Board's application and interpretation of various

provisions of Section 8(b) departs significantly from statutory policy and Supreme Court precedent.

Respectfully submitted,

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